

No. 82-1974

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF MACON,

Petitioner

v.

C. D. JOINER, *et al.*,

Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

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The question presented by the petition for a writ of certiorari in this case is whether the wage and hour provisions of the Fair Labor Standards Act (hereafter "FLSA") may constitutionally be applied to a publicly owned and operated mass transit system. The holding of the court below, that the FLSA *may* constitutionally be so applied, is consistent with, and in our view compelled by, *United Transportation Union v. Long Island Rail Road Co.*, 455 U.S. 678. Two other courts of appeals have reached the same conclusion as the court below: *Kramer v. New Castle Area Transit Authority*, 677 F.2d 308 (C.A. 3), *cert. den.*, No. 82-701 (Jan. 17, 1983); and *Dove v. Chattanooga Area Regional Transportation Authority*, 701 F.2d 50 (C.A. 6).

There is no contrary court of appeals' authority but there is one district court holding that the FLSA may

not constitutionally be applied to publicly owned and operated mass transit systems. *San Antonio Metropolitan Transit Authority v. Donovan*, 557 F. Supp. 445 (W.D. Tex.). Appeals from that decision have been taken to this Court in *Joe G. Garcia v. San Antonio Metropolitan Transit Authority* (No. 82-1913), docketed May 26, 1983, and *Donovan v. San Antonio Metropolitan Transit Authority* (No. 82-1951), docketed June 1, 1983.

For the reasons set forth in the *Garcia* jurisdictional statement (No. 82-1913), we believe that, particularly in light of the well-reasoned contrary decisions of the Third, Sixth and Eleventh Circuits, summary reversal of the district court's decision in the *San Antonio* case is the appropriate course because the argument against constitutionality is not sufficiently substantial to warrant plenary consideration.¹ If this Court does summarily reverse in the *San Antonio* case, the petition for a writ of certiorari should be denied in the present case. Alternatively, if probable jurisdiction is noted in the earlier filed *San Antonio* case and that case is set for argument, disposition of the petition for certiorari herein should await decision in *San Antonio*.

Respectfully submitted,

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¹ We are serving on counsel for petitioner the *Garcia* jurisdictional statement together with this memorandum.

